determine against whom they will litigate first and in what forum. While the prior ruling of this Court in *EEOC v. Waffle House*, 534 U.S. 279, 296-97, __ S. Ct. __ (2002), will protect the enforcement authority of the EEOC when a private litigant has concluded litigation first, application of the Fifth Circuit's approach provides no such protection to individuals. With the Fifth Circuit's analysis, defendants could choose to litigate against the EEOC first and after a favorable judgment, stop individual employees in state court with the application of the relitigation exception.

Because the Fifth Circuit's ruling involves a provision of the ADEA, § 626(c,) that is similar to § 616(b) of the FLSA pertaining to the initiation of agency litigation, the reach of the incorrect holding by the Fifth Circuit extends to cases involving the FLSA. Under the FLSA, an employee may bring a personal cause of action for wage and hour claims in either state or federal court until the point that the Secretary of Labor initiates a lawsuit for such remedies. The employee may maintain the action if it was filed before the agency action. The Ninth Circuit in *Bechtel Petroleum* adopted the District Court's decision refusing to issue an injunction under the relitigation exception. Applying the Fifth Circuit's analysis would produce a different result than in *Bechtel Petroleum* with respect to the FLSA. Because of the comparable provisions, there are additional litigants affected by the Fifth Circuit's ruling as well as other circuit conflicts, such as *Bechtel Petroleum*.

The Solicitor General claims that "The importance of the issue is further diminished by the fact-specific limitation that the court of appeals placed on its preclusion holding. The court expressly held that its decision does not apply when there is a clear divergence of interest between the EEOC and the private individual, Pet. App. 10a-11a, such as where the EEOC settles for injunctive relief and abandons its claim for monetary relief." However, earlier in his brief, the Solicitor General underscored the potential for such divergence of interest based upon the nature of the role of the EEOC and the personal rights which an individual seeks to protect, a fact the Solicitor General admitted

occurred with the EEOC case. Brief at 11. "While the EEOC has authority to seek relief for age discrimination victims in its conduct of litigation, it is guided by the overriding public interest in eliminating unlawful discrimination, as well as other considerations such as available resources to pursue enforcement efforts, not the narrow interests of particular individuals." The tension stems from the fact that uppermost for the EEOC is the vindication of the public interest. Sometimes the public interest is synonymous with that of the private litigant, but frequently there is a difference between the goals of each. The Solicitor General has admitted in his brief that during litigation by the EEOC, the agency subordinates the interests of the individual to the EEOC's objectives, concerns and considerations.

Further, despite the claim that the court should consider whether there is a "clear divergence of interest," the Fifth Circuit failed to conduct its own test in the Petitioners' case. The U.S. District Court had made a factual finding that the EEOC had failed to adequately represent the Petitioners. The Fifth Circuit gave no explanation for rejecting this finding of fact by the District Court which had presided over the prior action between the EEOC and the Respondents. The failure of the Fifth Circuit to define its requirements for a "clear divergence of interest" when presented with the opportunity to explain its rejection of the District Court's factual finding manifests the importance of this Court correcting the analysis of the notion of privity between the EEOC and a private litigant.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant Petitioners' writ of certiorari for plenary review, or in the alternative, that this Court grant Petitioners' writ of certiorari and vacate the judgment of the court of appeals.

Respectfully submitted,

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No. 04-1615

In the Supreme Court of the United States

DWIGHT VINES AND VAN MCGRAW,
PETITIONERS

v.

UNIVERSITY OF LOUISIANA AT MONROE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a judgment against the Equal Employment Opportunity Commission (EEOC) in an action under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, that seeks relief for particular individuals operates as collateral estoppel in a state law action filed by those individuals before the EEOC initiated its action.

2. Whether the court of appeals erred in failing to defer to the Louisiana courts' resolution of that issue.

3. Whether a district court's determination that the EEOC was not in privity with an individual employee is subject to *de novo* or clear error review.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 398 F.3d 700. The opinion of the district court (Pet. App. 24a-25a), and the report and recommendation of the magistrate judge (Pet. App. 26a-31a) are unreported.

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. *et seq.*, makes it unlawful, subject to certain exceptions, for an employer to discriminate in employment because of an individual's age.

29 U.S.C. 623. The ADEA gives the Equal Employment Opportunity Commission (EEOC) the authority to enforce the Act's prohibitions. 29 U.S.C. 626(b). In addition, the ADEA authorizes any individual to initiate a civil action in any court of competent jurisdiction for legal or equitable relief. 29 U.S.C. 626(c)(1). The right of an individual to bring such an action, however, terminates if the EEOC commences an action to enforce the right of such individual under the ADEA. *Ibid.* ("[T]he right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under this chapter.").

In States that have their own entities that investigate and afford remedies for age discrimination, an individual must bring an action before such an entity before filing suit under the ADEA. 29 U.S.C. 633(b). If an EEOC action is commenced with respect to the individual under the ADEA, however, "such action shall supersede any State action." 29 U.S.C. 633(a).

2. Petitioners Dwight Vines and Van McGraw retired from their positions at the University of Louisiana at Monroe (ULM) and began receiving retirement benefits under the Teachers' Retirement System of Louisiana. Pet. App. 2a. Thereafter, ULM rehired petitioners on a year-to-year basis, paying them a salary in addition to their retirement benefits. *Ibid.* In 1996, the University of Louisiana System (ULS) adopted a policy prohibiting full-time re-employment of retirees, and petitioners were informed that they would not be rehired for the 1996-1997 academic year. *Ibid.*

Petitioners filed suit against ULM and the Board of Supervisors of ULS (respondents) in the United States District Court for the Western District of Louisiana, alleging that respondents had engaged in discrimination

because of age in violation of the ADEA and Louisiana state law. Pet. App. 3a. Petitioners filed an identical action in Louisiana state court. *Ibid.* Respondents removed the state court action to federal court, where the cases were consolidated. *Ibid.*

Subsequently, the EEOC filed suit in federal court against respondents, alleging that respondents had discriminated against petitioners because of age in violation of the ADEA. Pet. App. 3a. The EEOC's action was consolidated with petitioners' action. *Ibid.*

The district court awarded partial summary judgment to respondents on petitioners' state law claims, holding that petitioners had failed to file the claims within the time allowed by state law. *Vines* v. *Northeast La. Univ.*, No. 97-cv-00873 (W.D. La. Aug. 3, 1999). In a later decision, the district court dismissed petitioners' remaining federal claims without prejudice based on the holding in *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), that the Eleventh Amendment bars a private ADEA suit for damages against the State. *Vines* v. *Northeast La. Univ.*, No. 97-cv-00873 (W.D. La. May 25, 2000). The district court also severed the removed action and remanded it to state court. *Ibid.*

The district court subsequently granted summary judgment against the EEOC, rejecting the EEOC's disparate impact and disparate treatment claims. Br. in Opp. App. 1b-17b. The EEOC filed a notice of appeal, but voluntarily dismissed its appeal before filing a brief in the court of appeals. Pet. App. 3a.

3. Relying on the judgment against the EEOC, respondents filed a peremptory exception in state court arguing that petitioners' remanded action was barred by res judicata, collateral estoppel, or both. Pet. App. 3a-4a. The state trial court granted the exception, holding

that the EEOC and petitioners were in privity for purposes of both res judicata and collateral estoppel. *Id.* at 4a. The state court of appeal reversed and remanded. *Ibid.* The Supreme Court of Louisiana denied respondents' application for a writ of certiorari. *Ibid.*

4. Respondents returned to federal district court and sought an injunction under the Anti-Injunction Act, 28 U.S.C. 2283, that would prevent petitioners from continuing to litigate their state law claims.[1] The magistrate judge recommended that the district court deny respondents' motion on alternative grounds. Pet. App. 26a-31a. First, the magistrate judge recommended holding that the EEOC and petitioners were not in privity. *Id.* at 27a-29a. Second, the magistrate judge recommended holding that the EEOC's failure to appeal demonstrated that it had failed to represent petitioners adequately. *Id.* at 29a-30a. The district court adopted the magistrate judge's recommendation and denied respondents' motion for an injunction. *Id.* at 24a.

5. The court of appeals reversed. Pet. App. 1a-23a. The court first held that it was not required to give full faith and credit to the Louisiana appellate court's res judicata or collateral estoppel determinations. *Id.* at 7a-8a. The court explained that such determinations are entitled to full faith and credit only if they "would be given preclusive effect under Louisiana law." *Id.* at 7a. The court then found that the determinations would not be entitled to such effect, explaining that, under Louisiana law, a judgment is entitled to preclusive effect only if it is a final judgment and the Louisiana appellate court's determinations at issue in this case were the sub-

[1] The Anti-Injunction Act permits a federal court to enjoin state court proceedings "to protect or effectuate its judgments." 28 U.S.C. 2283.

ject of an "interlocutory judgment and thus not entitled to preclusive effect." *Id.* at 8a.

The court of appeals then held that collateral estoppel precludes petitioners from litigating the issue of age discrimination in state court because that issue had been resolved adversely to the EEOC in the federal action and petitioners were in privity with the EEOC. Pet. App. 8a-19a. The court added that the EEOC is not always in privity with an individual because the interests of the EEOC and individuals may diverge, and that the privity determination therefore must be made on a case-by-case basis. *Id.* at 10a-11a. The court found, however, that in this case "it is clear that the EEOC's interest did not diverge from that of [petitioners]." *Id.* at 11a.

The court of appeals also rejected petitioners' argument that the EEOC's decision to dismiss its appeal demonstrated inadequate representation. Pet. App. 20a-21a. The court concluded that the EEOC acted with due diligence and reasonable prudence in voluntarily dismissing its appeal. *Id.* at 21a.

DISCUSSION

A. The Collateral Estoppel Issue Does Not Warrant Plenary Review Given The Absence Of A Conflict And The Relative Infrequency With Which It Arises

Petitioners seek review of the question whether a judgment against the EEOC in an ADEA action that seeks relief for particular individuals operates as collateral estoppel in an action filed by those individuals under state law before the EEOC initiated its action. That question does not warrant review. While the court of appeals' analysis of that issue is incorrect, its decision does not directly conflict with the decision of any other court of appeals, and the issue does not arise with suffi-

cient frequency, or have sufficient importance, to warrant review in the absence of a conflict.

1. a. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). An exception to the general rule exists when a person, "although not a party, has his interests adequately represented by someone with the same interests who is a party." *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2 (1989). In such circumstances, a judgment against a person's representative is binding on the person. See Restatement (Second) of Judgments § 41(1) (1982). For example, because the trustee of an estate represents the interests of the beneficiaries, a judgment against the trustee is binding on the beneficiaries. *Richter* v. *Jerome*, 123 U.S. 233, 246 (1887). Similarly, a judgment against an adequate class representative may be binding on members of the class. *Hansberry*, 311 U.S. at 41-42.

The principle of representative preclusion may also apply when a public entity is invested by law with authority to represent a person's interests. Restatement (Second) of Judgments, *supra*, § 41(1)(d). For example, in *Heckman* v. *United States*, 224 U.S. 413, 445-446 (1912), the Court held that a judgment in a case brought by the United States on behalf of Indians to set aside an illegal conveyance would be binding on the Indians. Public actions that seek relief for particular individuals, however, do not always bind the individuals. To the contrary, when "the remedies that a public official is empowered to pursue [are] * * * interpreted as being supplemental to those which private persons may pursue themselves, * * * the official's maintenance of an action